IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3030 OF 2005

Satish Dagadu Shelke ...Petitioner

Versus

State of Maharashtra ...Respondent

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Mr.Nitin Pradhan with Ms.S.D.Pradhan for Petitioner.

Mr.Rajesh More, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

DECEMBER 16, 2005.

P.C.

1. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith, by consent. Mr.More, A.P.P. waives notice for Respondent.

3. As short question is involved, Petition is taken up for final disposal forthwith, by consent.

4. This Petition takes exception to the order passed by the IIIrd Additional District Sessions Judge, Baramati dated 3rd December 2005 below Exhibit 23 in Sessions Case No.78 of 2002. The Petitioner who is accused in the above numbered case for offence punishable under Section 376 of the Indian Penal Code, moved an application during the course of cross-examination of the prosecutrix praying that the defence may be permitted to examine the prosecutrix so as to ask her about her friendship and relationship with accused No.2. According to the Petitioner, the said question would not amount to general character assassination of the witness as per the amendment in Section 376 of the Indian Penal Code read with proviso introduced in Section 146 of the Evidence Act, 1872, because the questions will be specific questions relating to relation with accused No.2, who is facing trial before the Court. This Application was made in writing. However, the Trial Judge dismissed the said application on recording the opinion that it is well settled that merely because a women is a prostitute, she is not

to be held as consenting party all the while and she can be non-consenting party and can be raped. The Trial Court has further held that it is open to the defence to prove consent of the prosecutrix at the relevant time but it is not open to the defence to extract admission of the prosecutrix regarding her illicit relations in the past. On this basis, the Court found that the questions sought to be put by the Advocate to the prosecutrix during cross-examination were barred by Section 146 of the Evidence Act.

5. Having heard the learned Counsel for the parties and going through the materials on record, I have no hesitation in taking the view that the Trial Judge has committed manifest error, which, if allowed to persist, would result in miscarriage of justice. The Application before the Trial Court moved by the Petitioner was very specific. By that Application, the Petitioner prayed to allow the defence to examine the prosecutrix in relation to the friendship and other matters between the prosecutrix and accused No.2. None of the questions which the defence intended to ask pertain

to general character assassination of the witness as such. If it is so, I am at a loss to understand how the proviso to Section 146 of the Evidence Act can be invoked, so as to deny the defence to ask questions which are not regarding the general immoral character of the witness. Section 146 of the Evidence Act reads thus:

> **"146. Questions lawful in cross-examination.-** When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-
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> (1) to test his veracity.
>
> (2) to discover who he is and what is his position in life, or
>
> (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture:
>
> Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character."

6. The provision envisages that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the

cross-examination as to prosecutrix's general immoral character. No more and no less. Whereas, in the present case, the defence intends to ask questions to the prosecutrix about her friendship and relation with accused No.2 and related matters. If that is the tenor of the questions which are going to be put to the prosecutrix, by no stretch of imagination, it can be said that it pertains to the general immoral character of the prosecutrix, so as to be precluded due to the proviso to Section 146 of the Evidence Act.

7. In the circumstances, the view taken by the Trial Judge cannot be sustained and will have to be set-aside, having regard to the specific request made on behalf of the Petitioner by a formal application in that behalf.

8. Rule made absolute in the above terms.

A.M.KHANWILKAR, J.